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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11 JOANNE ELIZABETH CLEVELAND, )  
12 et al. )

13 Plaintiff(s), )

14 v. )

15 COMPASS VISION, INC., et )  
16 al., )

17 Defendant(s). )  
\_\_\_\_\_ )

No. C07-5642 BZ

Related Case: C07-3431 BZ

**ORDER DENYING DEFENDANTS'  
MOTIONS TO DISMISS AND  
PLAINTIFFS' MOTION TO STRIKE  
AND CONTINUING JOINT CASE  
MANAGEMENT CONFERENCE**

18 Before me are defendants COMPASS VISION, INC. and  
19 NATIONAL MEDICAL SERVICES, INC. D/b/a NMS LABS' (NMS labs)  
20 motions to dismiss plaintiffs' complaint pursuant to Federal  
21 Rule of Civil Procedure 12(b)(6) and plaintiffs' motion to  
22 strike NMS labs' motion to dismiss.<sup>1</sup> Having reviewed the  
23 papers submitted by both sides, I find no need for argument on  
24 this motion and **VACATE** the March 19, 2008 hearing.

25 Defendants requests for judicial notice of the recent  
26 \_\_\_\_\_

27 <sup>1</sup> All parties have consented to my jurisdiction,  
28 including entry of final judgment, pursuant to 28 U.S.C. §  
636(c) for all proceedings.

1 decisions in Garlick v. Quest Diagnostics, Inc. from the  
2 United States District Court for the District of New Jersey  
3 (Case no. 06 cv 6422 (DMC), December 28, 2007) and in Perez-  
4 Rocha v. Commonwealth of Pennsylvania, from the Commonwealth  
5 Court of Pennsylvania (Case no. 2225 C.D. 2006, October 9,  
6 2007) are **GRANTED**.

7 Plaintiffs' motion to strike NMS labs' motion to dismiss  
8 pursuant to Federal Rule of Civil Procedure 12(f) and Civil  
9 Local Rule 3-4(e) because it refers to Garlick, which is  
10 captioned "Not for Publication", is **DENIED**. Federal Rule of  
11 Appellate Procedure and Local Circuit Rule 32.1(a) provides  
12 that a "court may not prohibit or restrict the citation of  
13 federal . . . orders . . . that have been . . . designated  
14 as . . . 'not for publication' . . . and issued on or after  
15 January 1, 2007." Nor is there anything in the Local Civil  
16 Rules of the District of New Jersey that prevents defendants  
17 from citing the opinion.

18 Striking defendants motions is not appropriate under  
19 Federal Rule of Civil Procedure 12(f) either. The reference  
20 to the Garlick order is not a "redundant, immaterial,  
21 impertinent, or scandalous matter." Fed.R.Civ.Pro. 12(f).  
22 Rather, Garlick involves similar claims against some of the  
23 same defendants in the instant action, and is relevant to the  
24 legal issues in this case. During oral argument on  
25 defendants' motions to dismiss in Wilson v. Compass Vision,  
26 Inc. (C07-3431 BZ, Northern District Court of California), the  
27 related case, I even inquired as to whether the court in  
28 Garlick had ruled on defendants' motions to dismiss. That no

1 one has chosen to publish Garlick, either electronically or in  
2 print, does not impact the effect of the ruling. Regardless,  
3 I do not find the holdings in Garlick and Perez-Rocha  
4 persuasive.

5 At this stage of the litigation, plaintiffs have pled  
6 sufficient facts to support their claims for emotional  
7 distress damages. Molien v. Kaiser Found. Hosps., 27 Cal.3d  
8 916, 925 - 28 (1990); cf. In re Dawson, 390 F.3d 1139 (9th  
9 Cir. 2004).

10 Similarly, plaintiffs have pled sufficient facts to  
11 defeat the motions to dismiss their claims for punitive  
12 damages. NMS labs argued that plaintiffs must amend their  
13 complaint to show there is a substantial possibility they will  
14 prevail on their punitive damages claims pursuant to  
15 California Code of Civil Procedure section 425.13. This  
16 argument, however, was raised for the first time in NMS lab's  
17 reply memorandum. Lujan v. Nat'l Wildlife Fed'n, 497 U.S.  
18 871, 894-95 (1990) (it is improper for moving party to  
19 introduce new facts or different legal arguments in reply  
20 memorandum.) As such, I will not consider the argument.

21 For the reasons set forth in the orders on the motions to  
22 dismiss in Quisenberry v. Compass Vision, et al. from the  
23 Southern District of California (Case No. 07CV1135, November  
24 14, 2007) and in Wilson, **IT IS ORDERED** that defendants'  
25 motions to dismiss are **DENIED**.

26 The March 5, 2008 joint continued case management

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1 conference set for both this and Wilson is **continued** to **March**  
2 **24, 2008 at 4:00 p.m.**

3 Dated: February 29, 2008

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6 Bernard Zimmerman  
United States Magistrate Judge

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